IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 808

HENRY HABEL, ARTHUR MCGOVERN and JULIO RODRIGUEZ, *Appellants*

v.

THE PEOPLE OF THE STATE OF NEW YORK, *Appellee*

Appeal from the Court of Appeals of the State of New York

REPLY TO MOTION TO DISMISS

The State has moved to dismiss the appeal in this case (and in the companion case of *Kenneth Burkard and Morgan Seifert* v. *New York,* No. 807) upon the grounds that federal questions were not passed upon in the state courts and that the rulings under review rest upon adequate and independent state grounds. Since the solution under these circumstances, itself, involves a federal question which invokes this Court's jurisdiction, *Love* v. *Griffith,* 266 U.S. 32, 33-34 (1924); *Lovell* v. *Griffin,* 303 U.S. 444, 450 (1938); *Henry* v. *Mississippi,* 379 U.S. 443, 447 (1965), we set forth in this Reply the manner in which federal constitutional issues were raised and resolved in the lower courts.

1. The Federal Constitutional Issue Was Raised and Decided at the Trial Level

The Record is ample that federal constitutional issues were raised at trial. No other conclusion is possible.

As pointed out in the Jurisdictional Statement, the original indictment in this case, No. 247/1964, was returned on January 20, 1964 (A-54).* During the course of discussions with the District Attorney's office during April of 1964, and while other motions with respect to that indictment were pending, counsel for co-defendant William Griffin was advised by an Assistant District Attorney of the existence of intercepted conversations between Griffin and others (A-27). He thereupon filed, for defendant Griffin, a motion for the suppression of such evidence. (A-28) The appellants herein joined in that motion.

The State caused a superseding indictment to be returned on June 12, 1964. Motions addressed to the superseding indictment were then filed. The notice of motion for defendant Griffin, after reciting preliminaries, went on to state: "the undersigned will make a motion, pursuant to Section 813-c, Code of Criminal Procedure, and the Fourth Amendment to the United States Constitution, in Part XXX. . . for an order suppressing the content of certain recorded conversations between the defendant Griffin and others."

The appellants herein filed a similar motion which asked for the suppression of "the content of recorded conversations . . .". (A-5, 12) The affidavit in sup-

* References, unless otherwise indicated, are to the printed record before the New York Court of Appeals filed as a part of the Record herein.

port of the motion made by these appellants incorporated, in its entirety, the affidavit of counsel for the defendant Griffin.

An evidentiary hearing was denied by Justice Schweitzer, sitting in the Motions Part. In his Opinion, Justice Schweitzer wrote:

> "3. The motion for an order to suppress the use of certain recorded conversations is denied (*People* v. *Golly,* 250 N.Y.S. 2d 210). However, the defendants are not precluded from raising any constitutional issue regarding the admission of this evidence at the time of trial. See *People* v. *Laverne,* 14 N.Y. 2d 304 (1964) where it was held that Title II-B of the Code of Criminal Procedure (§ 813-c et seq.) applies only to tangible property." (A-45)

The reliance of Justice Schweitzer in his Opinion on *People* v. *Golly* was not a foreclosure to these appellants of the right to pursue their remedy. For, in *People* v. *Golly,* Justice Schweitzer, himself, had written:

> "It was Justice Geller's conclusion—after extended analysis of the practical and procedural problems involved—that '[*t*]*he nature and volume of the work in* [*a motion part of a criminal court*] *precludes prompt attention to motions to suppress requiring the holding of hearings*' (31 Misc. 2d at pp. 490, 491, 221 N.Y.S. 2d at p. 851).
>
> "It is to be noted that in enacting legislation to provide a procedural method for raising the suppression issue, the legislature likewise expressly provided that, where an indictment has already been had, 'the motion shall be made *in the court having trial jurisdiction* of such indictment' (Code Crim. Proc. § 813-c, emphasis supplied). Although I recognize that the legislature was concerned with jurisdiction of courts, rather

> than proper venue in a part within a given court, I am persuaded that, in deciding that the motion should be brought in a trial court, it was impressed with the same considerations of administrative case and practicality as was Justice Geller in the Gonzales case."

In light of Justice Schweitzer's opinion, as soon as this case was assigned to a trial part, defendants renewed their motion.

The record at trial reveals a *complete* evidentiary hearing of the constitutional issues raised by room eavesdropping accomplished by a trespass and the trial court's decision reflects a determination *on the merit of that issue.* (A-115; particularly A-119) Pleas of guilty were then entered and accepted on that basis. (A-248, 249, 250, 251)

It may fairly be said that the constitutional issues in the case were as fully raised in the trial court as in *Berger* v. *New York,* No. 615. No further evidence is necessary on that point; nor could any additional useful evidence be developed upon a new trial. This record is as complete on the constitutional issue as it will ever be. See *Mills* v. *Alabama,* 384 U.S. 214 (1966).

2. The New York Court of Appeals at Least Impliedly Sustained the Constitutionality of the Statute

In its ruling, the Court of Appeals wrote:

> "Recording of conversations made pursuant to judicial orders authorizing eavesdropping under section 813-a of the Code of Criminal Procedure are not such property 'unlawfully obtained' . . ."

Implicit in this is a finding that such recordings were lawfully obtained, as, indeed, the same court held the same day in *Berger* v. *People,* 18 N.Y. 2d 638 (1966), certiorari granted, No. 615, December 6, 1966.

3. The Convictions Are Final

Neither of the New York appellate courts remanded this case for a new trial. If nothing further is done, the sentences will automatically be carried out. The fact that the state appellate courts authorized the withdrawal of guilty pleas does not make the pending convictions and sentences a nullity.

For the foregoing reasons, the appellants respectfully ask that the Motion to Dismiss be denied and probable jurisdiction noted.

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HABEL ET AL. *v.* NEW YORK.

APPEALS FROM THE COURT OF APPEALS OF NEW YORK.

Nos. 807 and 808. Decided June 12, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeals are dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied.